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No. 07-538

IN THE

Supreme Court of the United States

ARTHUR P. CHRISTIE, ANTHONY L. ALFORD, DANIEL E. DEIGHTON, FREDERICK W. JENNART, DAVID N. HARVEY, M.D., MICHAEL A. HELLWEGE, M.D., F. HUNT SANDERS, M.D., RICHARD J. SULLVIAN, M.D., TITUS A. TAUBE, M.S., C. SCOTT EDENFIELD, M.D., RAHIL KAZI, M.D., RICHARD L. HEATON, M.D., BRITTON L. PILCHER, M.D., SANTANU DAS, M.D., THOMAS C. JOHNSON, M.D., RICHARD B. ELLIS, M.D., HOSPITAL AUTHORITY OF HOUSTON COUNTY D/B/A HOUSTON MEDICAL CENTER,

Petitioners,

—v.—

RUSSELL E. ADKINS, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF BLACK PHYSICIANS IN OPPOSITION TO CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Now comes the Association of Black Physicians and moves this Court for leave to file a brief as *amicus curiae.*

The Association of Black Physicians is a national organization of African-American physicians. As such, its members, on their own behalf, and on behalf of other physicians of color, are vitally concerned with the existence of viable remedies for institutionalized racism in the health care profession.

The Association of Black Physicians seeks to show that this Court's rejection of a federal privilege for academic peer review as contrary to congressional intent in enacting anti-discrimination law has equal application to hospital peer review. Lower federal courts have been virtually unanimous in denying recognition to a medical peer review privilege in the context of discrimination suits.

The Association of Black Physicians gave timely notice to the parties of its intent to file an amicus brief in this Court and sought the consent of the parties, which was withheld by Respondent..

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

Whether this Court should grant certiorari to revisit its holding in *Equal Employment Opportunity Commission* v. *University of Pennsylvania*, 433 U.S. 182 (1990), declining to recognize a peer review privilege under Rule 501 of the Federal Rules of Evidence.

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INTEREST OF AMICUS[1]

The Association of Black Physicians is a national organization of African-American physicians. Within the lifetime and memory of some members of the Association, African-American physicians were barred from practicing in "white" hospitals in some parts of the United States, and black patients were not permitted to utilize these hospitals. Its members, on their own behalf, and on behalf of other physicians of color, are vitally concerned with the existence of viable remedies for institutionalized racism in the health care profession, which may otherwise perpetuate through subtle means what was once done overtly.

Precisely because of the importance of the peer review process to the maintenance of high standards of medical practice, such peer review processes must be kept free of the extraneous influence of racial favoritism, avoiding less favorable treatment of African-American physicians and less accurate peer review.

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1 No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made any monetary contribution toward the preparation and submission of this brief. Pursuant to Rule 37.2 (b), this brief is accompanied by a motion for leave to file as *amicus* after failing to receive the consent of all parties to its filing.

SUMMARY OF ARGUMENT

The reasoning of this Court in *University of Pennsylvania* v. *Equal Employment Opportunity Commission*, denying the creation of a federal privilege for peer review in the academic context has equal application to a hospital peer review privilege which would prevent discrimination suits from fully developing the evidence of disparate treatment on the basis of race or other protected categories.

Congress has chosen not to create such a privilege, both in its enactments of civil rights litigation after *University of Pennsylvania*, and in its enactment of the Health Care Quality Improvement Act.

The lower federal courts have been virtually unanimous in denying recognition to a medical peer review privilege in the context of discrimination suits.

There is thus no split among the circuits or important unresolved question to merit this Court's consideration.

PROCEDURAL HISTORY

Dr. Russell E. Adkins brought suit in the United States District Court for the Middle District of Georgia against the Houston Medical Center and numerous employees, under 42 U.S.C.§§ 1981, 1983, and 1985, asserting racial discrimination in his peer review evaluations, which were used to deprive him of privileges at the hospital. The District Court narrowed his discovery of peer review evaluations to the surgical department and a five year period, recognizing a medical peer review privilege and balancing his discovery against that privilege. Following discovery, the district court granted summary judgment to the defendants.

Dr. Adkins appealed, and the United States Court of Appeals for the Eleventh Circuit found that the district court had erred in recognizing a medical peer review privilege, and vacated the district court judgment on the ground that Dr. Adkins had been deprived of the discovery he was entitled to in order to prove his case.

After the Eleventh Circuit declined to rehear the appeal *en banc*, the Defendants petitioned this Court for certiorari.

ARGUMENT

A. Treatment of the Peer Review Privilege in this Court

In *Franklin and Marshall College* v. *Equal Employment Opportunity Commission,* 476 U.S. 1163 (1986), Justice White, joined by Justice Blackmun, dissented from the denial of certiorari, arguing that the holding of the Third Circuit Court of Appeals in that case, at 775 F. 2d 110 (1985), rejecting an asserted privilege for subpoenaed confidential peer reviewed materials, absent a showing of facts supporting an inference of discrimination, conflicted with the holding of the Seventh Circuit Court of Appeals in *EEOC* v. *University of Notre Dame du Lac,* 715 F. 2d 331 (1983).

However, four years later, in *University of Pennsylvania* v. *Equal Employment Opportunity Commission,* 433 U.S. 182 (1990), the United States Supreme Court took up the question, based upon the possible conflict between the Third Circuit's position and that of the Seventh Circuit, and unanimously rejected the recognition of federal peer review privilege in discrimination cases.

The Court's reasons for rejecting the privilege are at least as compelling today as they were at that time. This Court noted in *University of Pennsylvania,* that the creation of new privileges is to be avoided, since they are in derogation of the common law rule that the public has a right to every person's evidence. (citing *Trammel* v. *United States,* 445 U.S. 40, 50 (1980), and *United States* v. *Bryan,* 339 U.S. 323

(1950).

This Court noted, in *University of Pennsylvania*, that Congress, in enacting the Equal Employment Opportunities Act of 1972, had explicitly extended the reach of Title VII of the Civil Rights Act of 1964 to educational employees of universities, and had done so over arguments that this extension would hinder the universities' ability to hire and promote faculty members. 42 U.S.C.§ 2000e-(8) and 2000e-(9) provided the EEOC with the ability to gather evidence to investigate discrimination, using subpoena power if necessary. Congress had thus considered the competing concerns and had decided not to recognize the privilege, and the Court would not do so.

Moreover, the Court noted that however important the goal of permitting a university faculty to deliberate freely concerning the quality of peers being considered for tenure, this concern was outweighed by the "great, if not compelling" interest in eliminating invidious discrimination. *University of Pennsylvania, supra*, 433 U.S. at 193.

In the case at bar, the Petitioner seeks to have this Court revisit its holding in *University of Pennsylvania* v. *Equal Employment Opportunity Commission, supra,* 433 U.S. 182, in the context of peer review by a hospital. In enacting the Title VII of the Civil Rights Act of 1964, Congress made no distinction between hospitals and other employers covered by the statute. 42 U.S.C. § 2000e (a) and (b). While this case arises under separate statutes which prohibit racial discrimination in employment, particularly by a government entity and its employees, 42 U.S.C. §§ 1981, 1983 and 1985, it is inconceivable

that a rule of privilege which does not apply to racial and other discrimination claims under Title VII would be recognized under these statutes.

At the time this Court decided *University of Pennsylvania*, it noted: "Congress has made the choice. If it dislikes the result, it may revise the statute." 493 U.S. at 193. As discussed below, an examination of congressional enactments, far from changing the result of *University of Pennsylvania, supra,* with respect to hospitals, reinforces it.

B. Treatment of The Peer Review Privilege in Congress

Congress has declined many opportunities to take up the question of privilege in the context of federal discrimination suits, several of them in the immediate wake of the *University of Pennsylvania.*

For instance, later in the year that this Court announced *University of Pennsylvania,* Congress passed the Americans with Disabilities Act of 1990, 42 U.S.C.§ 12101 et seq., a comprehensive enactment involving discrimination in employment, public sector programs and services, and private sector services and facilities. In a legislative process which involved careful deliberation over provisions which were uncharted in their application to such a wide scope of possible discrimination, Congress did not see a need to add a peer review privilege.

In that same year, Congress amended the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., with the Age Discrimination in Employment Claims Act of 1990. Again, Congress made no

amendment to have a peer review privilege included in the revised statute.

During the year following the determination by this Court of *University of Pennsylvania*, Congress passed 42 U.S.C.§ 1981a, the Civil Rights Restoration Act of 1991, and made no amendment adding a rule of peer review privilege in the context of race discrimination.

With respect to hospitals, even prior to *University of Pennsylvania*, Congress had enacted the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq. In enacting this statute, Congress chose not to extend any privilege to the peer review process in a healthcare setting. It is hardly credible that what Congress chose not to do in the context of a statute specifically addressed to healthcare deliberations by peer review bodies, it approved *sub silentio* in the context of the enforcement of civil rights against employment discrimination, a privilege which would impede the enforcement of these statutes promoting a "great, if not compelling" purpose. *University of Pennsylvania, supra*, 433 U.S.at 193.

Indeed, the importance of the peer review process to insuring the quality of medical care is further reason why Congress sought to insure that the process would not be poisoned by discriminatory practices which would make the process less reliable while adversely affecting physicians of color by introducing unfair negative factors into their evaluations.

C. The Peer Review Privilege in the Lower Courts

The lower federal courts have had no difficulty in discerning the rule enunciated by this Court, in *University of Pennsylvania* v. *Equal Employment Opportunity Commission,* rejecting the creation of a peer review privilege, nor in recognizing its application to the healthcare context, especially where civil rights violations are alleged.

Matter of Dinnan, 661 F. 2d 426 (5th Cir. 1981) anticipated the rule of *University of Pennsylvania*, in rejecting a claim of confidentiality of the peer review process where the plaintiff asserted that her denial of tenure had been based upon her gender.

Even at the time it was inclined to recognize a peer review privilege in an academic context, in *EEOC* v. *University of Notre Dame du Lac, supra*, 715 F. 2d 331, the Seventh Circuit declined to recognize such a privilege for a hospital peer group committee's disciplinary proceeding, despite recognizing a substantial state interest in correcting deficiencies in medical care, when the interest conflicted with the public interest in the ability of a private plaintiff to enforce federal antitrust law. *McHenry* v. *Shadur*, 664 F. 2d 1058 (1981). The Seventh Circuit was not addressing a civil rights claim. But there is an easy parallel in its recognized that, like the Plaintiff in the case at bar, the physician in that case would be frustrated in his ability to produce proofs, if he could not obtain discovery of disciplinary proceedings against other doctors which would show that other physicians with comparable or worse records were not denied staff privileges. (The same result was reached on similar reasoning by a district court faced with the same issue in an anti-trust suit, in *Robinson* v.

Magovern, 83 F.R.D. 79 (W.D. Pa. 1979).

The Fourth Circuit Court of Appeals, in *Virmani* v. *Novant Health Services*, 259 F. 3d 284 (2001), recognized that no medical peer review privilege should be recognized in the context of allegations of civil rights violations, following the reasoning of this Court in *University of Pennsylvania*, that the ferreting out of invidious discrimination was an interest that trumped the significant interest in candor in the peer review process.

Federal district courts, as well, have shown a virtual unanimity in refusing to recognize a peer review privilege for deliberations of a medical committee in the face of allegations of civil rights violations. Thus, the District Court in *Robertson* v. *Neuromedical Center*, 169 F.R.D. 80 (M.D. La. 1996), reasoned that Congress, in passing the Americans with Disabilities Act, had intended to pass sweeping legislation to protect persons with disabilities from discrimination, and that this outweighed the hospital's interest in the confidentiality of the peer review process. The court also relied on the Health Care Quality Improvement Act as indicating that Congress had not intended to afford the kind of records involved the degree of confidentiality which state law provided.

Johnson v. *Nyack Hospital*, 169 F.R.D. 550 (S.D.N.Y. 1996), in a race discrimination action under 42 U.S.C.§ 1981 and 1985, noted that Congress had specifically denied immunity under the Civil Rights Act for participants in peer review proceedings, showing that Congress accorded more weight to the vindication of civil rights than to the confidentiality of the peer review process..

The court in *Patt* v. *Family Health Systems,Inc.*, 189 F.R.D. 518 (E.D. Wisc.1999) was also persuaded that the legislative history of the Health Care Quality Improvement Act showed that Congress had considered and rejected a peer review privilege for medical review, and was willing to sacrifice the confidentiality of those proceedings to advance civil rights.

District courts faced with other civil rights claims have likewise eschewed recognition of a medical peer review privilege. In the employment context, the claim of a physician that he had been deprived of due process of law was found to compel disclosure of the peer review committee's communications which resulted in the denial to him of staff privileges. *Ott* v. *St. Luke Hospital of Campbell County, Inc.* 522 F. Supp. 706 (E.D. Ky. 1981).

In *Jenkins* v. *DeKalb County, Ga.*, 2007 WL 781870 (N.D. Ga. 2007), the district court considered the interest in vindication of civil rights of the decedent by the estate of an inmate which alleged that the inmate had been denied medical treatment and retaliated against by jail officials. The court declined to create a federal peer review privilege for the post-death investigation report.

Similarly, in *Marshall* v. *Spectrum Medical Group,* 198 F.R.D. 1 (D. Me. 2000), the court declined to recognize a federal peer review privilege to shield the plaintiff's credentialing file, where to do so might thwart his ability to prove disability discrimination.

Petitioners' attempt to portray the state of the law as one of "confusion" and "disarray" is simply inaccurate. As noted by Respondent, the Fifth Circuit,

in *United States* v. *Harris Methodist Ft. Worth*, 970 F.2d 94 (1992) did not address a medical peer review privilege in the context of a discrimination claim, but rejected as unreasonable an administrative search which sought documents of random targets pursuant to Title VI. This rule is consistent with the requirement of Title VII that a subpoena by the EEOC, to be enforceable, must be relevant to an investigation of discrimination. The recognition of a medical review privilege in discrimination cases is not necessary to the rejection of a roving commission without limits.

Hadix v. *Caruso*, 2006 LEXIS 72967 (W.D. Mich. Oct. 6, 2006), recognizes a medical peer review privilege in the context of prisoner's rights litigation, reasoning that such litigation over the quality of medical care is the constitutional equivalent of malpractice litigation. This decision is thus entirely capable of being harmonized with the rejection of such a privilege in the context of discrimination claims.

Petitioners are thus unable to point to a single instance in which a federal court has held a medical peer review privilege to prevent a discrimination plaintiff from obtaining discovery concerning the peer review process as applied to that plaintiff or as to others subject to peer review. This Court therefore has no occasion to address an issue which the lower federal courts have had no trouble understanding to be the logical extension of its ruling in *University of Pennsylvania* v. *Equal Employment Opportunity Commission*, and the manifest intent of Congress.

CONCLUSION

The history of the treatment of the peer review process in this Court, by Congress, and by the lower courts in discrimination cases demonstrates a clear understanding that federal courts should not recognize a peer review privilege, whether in the medical or academic setting, in the face of a suit alleging discrimination. There is therefore no important issue or split in the circuit courts requiring the attention of this Court.

Respectfully submitted,

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